

No. 7494

In the United States Circuit Court of
Appeals for the Ninth Circuit

————— 20

UNITED STATES OF AMERICA, APPELLANT

vs.

WALTER WOODALL, APPELLEE

—————
APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

—————
BRIEF FOR THE APPELLANT

—————
PEIRSON M. HALL,
United States Attorney.

HUGH L. DICKSON,
Asst. United States Attorney.

WILL G. BEARDSLEE,
Director, Bureau of War Risk Litigation.

KEITH L. SEEGMILLER,
Attorney, Department of Justice

FILED

JAN 25 1935

PAUL P. MERRIN



INDEX

	Page
Statement of the case.....	1
Pertinent statutes and regulations.....	4
Question presented.....	5
Assignment of errors.....	5
Summary of the evidence.....	9
Points and authorities.....	18
Argument: I. There is no substantial evidence that plaintiff was totally disabled from November 1919.....	18
Conclusion.....	23

CITATIONS

Cases:

<i>Eggen v. United States</i> , 58 F. (2d) 616 (C. C. A. 8th).....	22, 23
<i>Falbo v. United States</i> , 64 F. (2d) 948 (C. C. A. 9th), affirmed per curiam, 291 U. S. 646.....	18, 22
<i>Grate v. United States</i> , 72 F. (2d) 1 (C. C. A. 8th), certiorari applied for.....	18, 19
<i>Hamilton v. United States</i> (C. C. A. 5th), 73 F. (2d) 357.....	20
<i>Lumbra v. United States</i> , 290 U. S. 551.....	23
<i>Penna. R. Co. v. Chamberlain</i> , 288 U. S. 333.....	23
<i>Proechel v. United States</i> , 59 F. (2d) 648 (C. C. A. 8th).....	21
<i>Puckett v. United States</i> , 70 F. (2d) 895 (C. C. A. 5th), certio- rari denied, 55 S. Ct. 99.....	18, 19
<i>Stevens v. The White City</i> , 285 U. S. 195.....	23
<i>United States v. Baker</i> (C. C. A. 4th), 73 F. (2d) 455.....	18, 20
<i>United States v. Baker</i> (C. C. A. 9th), decided November 13, 1934.....	20
<i>United States v. Crume</i> , 54 F. (2d) 556 (C. C. A. 5th).....	18
<i>United States v. Doublehead</i> , 70 F. (2d) 91 (C. C. A. 10th).....	20
<i>United States v. Ennis</i> , 73 F. (2d) 310 (C. C. A. 4th).....	22
<i>United States v. Green</i> , 69 F. (2d) 921 (C. C. A. 8th).....	21
<i>United States v. Hansen</i> , 70 F. (2d) 230 (C. C. A. 9th).....	18, 21
<i>United States v. Hill</i> , 61 F. (2d) 651 (C. C. A. 9th).....	18
<i>United States v. Howard</i> , 64 F. (2d) 533 (C. C. A. 5th).....	20
<i>United States v. Linkhart</i> , 64 F. (2d) 747 (C. C. A. 7th).....	22
<i>United States v. McShane</i> , 70 F. (2d) 991 (C. C. A. 10th), certiorari denied 55 S. Ct. 141.....	18, 19, 22, 23
<i>United States v. Messinger</i> , 68 F. (2d) 234 (C. C. A. 4th).....	20
<i>United States v. National Bank of Commerce of Seattle</i> (C. C. A. 9th), decided November 19, 1934.....	20

II

Cases—Continued.	Page
<i>United States v. Renfrow</i> , 60 F. (2d) 488 (C. C. A. 10th)---	22
<i>United States v. Stephens</i> (C. C. A. 9th), decided November 13, 1934-----	20
<i>United States v. Thomas</i> , 53 F. (2d) 192 (C. C. A. 4th)----	21
<i>United States v. Timmons</i> , 68 F. (2d) 654 (C. C. A. 5th)---	21
Statutes:	
Act of Oct. 6, 1917, 40 Stat. 409-----	4
Section 13, W. R. I. A., 40 Stat. 555-----	4
Miscellaneous:	
Treasury Decision 20, War Risk, March 9, 1918-----	4

**In the United States Circuit Court of
Appeals for the Ninth Circuit**

No. —

UNITED STATES OF AMERICA, APPELLANT

vs.

WALTER WOODALL, APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA*

BRIEF FOR THE APPELLANT

STATEMENT OF THE CASE

Walter Woodall, appellee, hereinafter called plaintiff, brought suit against the United States, appellant, hereinafter called defendant, on a contract of War Risk Term Insurance in the amount of \$5,000.00. The complaint (R. 4-9) alleged maturity of the contract by total permanent disability from and after November 1919 as a result of pulmonary tuberculosis, gall bladder trouble, and other disabilities. The answer (R. 10-11) joined issue on the allegation of total permanent disability.

The case was tried on May 31, 1933, before the Court and without a jury. Plaintiff's service record showed no sickness or medical treatment ex-

cept for chancroid during his service in the Navy from December 31, 1917, to September 11, 1918 (Pltf's. Ex. 2). There was no direct medical testimony of plaintiff's condition prior to June 1920, at which time he had an operation for gall-bladder trouble (R. 38).

Dr. Hodges testified from memory concerning an examination he had made in June 1920, that "as best he could remember" he made a diagnosis "as best he could under the circumstances" of "gall-bladder trouble with possible gallstones or inflamed chronic bronchitis, severe", and suspected tuberculosis (R. 47-48). Repeated examinations between June 1920 and August 2, 1921, when active tuberculosis was first diagnosed, revealed the following findings:

August 20, 1920 (R. 73-74): No abnormality except operative scar which was "getting along all right" (R. 73). Plaintiff complained of no symptoms except recent operation.

September 10, 1920 (R. 78): Plaintiff passed physical examination for employment with Southern Railroad. His heart and lungs were found to be in good condition (R. 78).

April or May, 1921 (R. 62-63): Plaintiff appeared fatigued and emaciated with infection of bowels and gall-bladder disturbance which should clear up after treatment.

June 14, 1921 (Pltf's. Ex. # 8): Heart, lungs, and abdomen negative.

After the diagnosis of active tuberculosis an examination on July 7, 1922 (R. 65, Pltf's. Ex. # 22), revealed minimal tuberculosis, arrested and curable, and three succeeding examinations, October 13, 1922 (R. 68-69, Pltf's. Ex. # 12, 13), and April 10, 1923 (R. 76, 77, Pltf's. Ex. # 14, 15), showed tuberculosis moderately advanced, arrested, and that plaintiff was able to work. Dr. Cohn, plaintiff's witness, in response to a hypothetical question testified that plaintiff had been totally permanently disabled "from some time prior to the first day of January 1920" (R. 56). On cross-examination he stated he could not render an opinion as to the curability of the disease in 1920 (R. 58).

The lay evidence consisted principally of plaintiff's testimony that though he has worked for various short periods aggregating more than two years he has at times during and since service felt tired and that he has had a cough with pains in his chest and abdomen which have hampered him in some of his attempts to work. He testified that on four occasions he had passed a physical examination before being accepted for employment. There was other lay testimony to the effect that in the winter of 1922 and 1923 plaintiff was unable to do the work in an undertaking parlor where he was employed as an attendant as part of his Vocational Training. A detailed summary of the evidence is set out hereinafter at pages 9 to 18.

At the conclusion of all the evidence the defendant moved for entry of findings of fact, conclusions

of law and judgment in its favor (R. 82-84) and to the denial of this motion an exception was duly allowed (R. 84). Thereupon the Court ordered entry of findings and judgment for the plaintiff and against the defendant to which action by the Court defendant's exception was allowed (R. 79). On July 7, 1933, judgment was entered awarding plaintiff \$28.75 for each month since November 1919 (R. 27-28). Defendant's petition for appeal (R. 97-98) and assignment of errors (R. 99-103) were duly filed and the appeal allowed (R. 104).

PERTINENT STATUTES AND REGULATIONS

The contract sued upon was issued pursuant to the provisions of the War Risk Insurance Act and insured against death or permanent and total disability (40 Stat. 409).

Section 13 of the War Risk Insurance Act (40 Stat. 555) provided that the Director of the Bureau of War Risk Insurance—

shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act necessary or appropriate to carry out its purposes, * * *

Pursuant to this authority there was promulgated on March 9, 1918, Treasury Decision No. 20, reading:

Any impairment of mind or body which renders it impossible for the disabled per-

son to follow continuously any substantially gainful occupation shall be deemed, * * * to be total disability.

Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *

QUESTION PRESENTED

Whether there was any substantial evidence that the plaintiff was totally permanently disabled from and after November 1919.

ASSIGNMENT OF ERRORS

I

That the District Court erred in making and entering its finding No. 5, as follows:

5. That it is true that while serving the defendant as aforesaid and prior to the date of the honorable discharge of plaintiff as aforesaid mentioned, plaintiff herein contracted certain diseases, injuries, and disabilities resulting in and known as pulmonary tuberculosis, gall bladder disabilities, and other disabilities (R. 99).

II

That the District Court erred in making and entering its finding No. 6, as follows:

6. That it is true that under the provisions of the said Act and other Acts amen-

datory thereof, hereinbefore described and under and by virtue of the terms of the policy of insurance issued by the defendant herein to plaintiff, plaintiff is entitled to the payment of the sum of \$28.75 for each and every month that he may be permanently and totally disabled (R. 100).

III

That the District Court erred in making and entering its finding No. 7, as follows:

7. That it is true that said diseases, injuries, and disabilities, have continuously, since the month of November 1919, rendered and still do render plaintiff, Walter Woodall, wholly unable to follow continuously any substantially gainful occupation; that such diseases, injuries, and disabilities are of such a nature and founded upon such conditions that it is reasonably certain they will continue throughout plaintiff's lifetime in the same or greater degree so as to prevent him from following continuously any substantially gainful occupation. That plaintiff has been ever since the month of November 1919, and still is totally and permanently disabled by reason of and as a direct and proximate result of such disabilities above set forth (R. 100).

IV

The District Court erred in making and entering its finding No. 11, as follows:

11. That it is true that the aforesaid policy of war risk term insurance was in full force and effect during the month of November 1919, the date upon which the plaintiff was and became and ever since has been permanently and totally disabled for insurance purposes (R. 101).

V

The District Court erred in making and entering its Conclusion of Law No. 1, as follows:

1. That the insured, to-wit: the plaintiff, Walter Woodall, became permanently and totally disabled during the month of November 1919, and while said \$5,000.00 policy of war risk term insurance was in full force and effect, and that at all times from and after said month of November 1919, the plaintiff was, ever since has been and now is totally and permanently disabled (R. 101).

VI

That the Court erred in making and entering its Conclusion of Law No. 2, as follows:

2. That the plaintiff herein is entitled to recovery from the defendant, United States of America, in accordance with the said war risk term insurance contract and the laws applicable thereto, monthly installments in the sum of \$28.75 each for each and every month commencing with the month of November 1919, and continuously thereafter

as long as he lives and continues to be permanently and totally disabled (R. 101).

VII

That the District Court erred in making and entering herein its Judgment for the plaintiff (R. 102).

VIII

That the District Court erred in denying Findings of Fact and Conclusions of Law as proposed by the defendant (R. 102).

IX

That the District Court erred in failing and refusing to find as proposed by defendant that plaintiff did not become totally disabled prior to the 1st day of February 1920 from tuberculosis, or any other disability, and did not become permanently disabled prior to the said 1st day of February 1920 from tuberculosis or any other disability (R. 102).

X

That the District Court erred in failing and refusing to make and enter its Conclusions of Law that the plaintiff, Walter Woodall, is not entitled to recover anything by his complaint and the defendant is entitled to a judgment, that plaintiff take nothing, and defendant be awarded its costs (R. 102).

XI

That the District Court erred in denying defendant judgment as proposed by the defendant (R. 103).

XII

That the District Court erred in denying defendant's Motion for Judgment at the conclusion of the evidence (R. 103).

SUMMARY OF THE EVIDENCE

Plaintiff's medical record showed no sickness or medical treatment while in the service except for chancroid and further showed that no disability was found upon examination of plaintiff at the time he was discharged from the service (Pltf.'s Ex. 2). Though plaintiff testified that soon after leaving service he consulted Dr. Evans, who gave him some kind of treatment for stomach and gall bladder trouble and cough (R. 43), Dr. Evans was not called to testify nor was any explanation offered for the absence of a more extensive report of his examination.

The earliest direct medical evidence was given by Dr. Hodges who reported from memory an examination he made of plaintiff in June 1920. He stated "as best he could remember" he made a diagnosis "as best he could under the circumstances" of "gall bladder trouble with possible gall stones or inflamed chronic bronchitis severe" and suspected tuberculosis (R. 47-48). He did not

use an X-ray and he made no sputum test. After about a dozen treatments he did not see plaintiff again until about 1928. Though he stated that the operation in June 1920, was successful and that there were occupations not requiring much physical exertion or exposure which plaintiff might have followed fairly well, he nevertheless stated that he thought plaintiff was totally permanently disabled in 1920 (R. 48-49).

Between this date and the fall of 1923 fourteen doctors examined plaintiff. A summary of their findings is set forth below :

August 30, 1920, Drs. Nolan (R. 73-74) and Macgruder (R. 74-75): No abnormality found except the operative scar which was "getting along all right" (R. 73). Plaintiff complained of no symptoms except his recent operation. (Based upon Pltf's. Ex. 5, 6).

September 10, 1920: Upon examination by a physician for the Southern Railroad, plaintiff was accepted as physically fit for employment by that company. The examining doctor testified that though it was a general examination the lungs and heart were found to be in good condition (R. 78).

April or May, 1921 Dr. Hawkins (R. 62-63): Plaintiff was fatigued and emaciated with some infection of the bowels and gall bladder disturbance caused by bacteria which could be eliminated in a few months after which the condition should improve. Some operative adhesions were noted but

the doctor stated that these usually accommodated themselves. Plaintiff was too weak physically to follow an occupation at that time.

June 14, 1921 (Pltf.'s Ex. # 8): Heart, lungs, and abdomen negative and X-ray negative for bone change. (Referring to a leg injury not otherwise in evidence.)

July 28, 1921 Dr. Long (Pltf.'s Ex. # 9): Heart and lungs show no pathology.

August 2 and November 17, 1921, Dr. Dunham. (Pltf.'s Ex. #10, 11): Pulmonary tuberculosis, chronic, moderately advanced, active.

July 7, 1922, Dr. Smart (R. 65): Minimal tuberculosis, arrested and curable. (Based upon report introduced as Pltf.'s Ex. #22.)

October 13, 1922, Dr. Essenson (R. 68-69): Arrested tuberculosis with no evidence of activity. The examination included x-ray findings. (Based upon a written report introduced as Pltf.'s Ex. #13.)

October 13, 1922, Dr. Chandler (Pltf.'s Ex. #12): Pulmonary tuberculosis, chronic, moderately advanced. Prognosis, favorable.

April 10, 1923, Drs. Swink (R. 77) and Boyd (R. 76-77): Fibrosis of upper lobes of lungs, inactive if tuberculosis. Plaintiff failed to report for laboratory and x-ray tests. Able to work as freight brakeman or in clerical position. (The witnesses were familiar with the requirements of these occupations. Based upon Pltf.'s Ex. #14, 15.)

August 30, 1923, Dr. Allen (Pltf.'s Ex. #16): Tuberculosis, pulmonary, chronic, arrested. Prognosis, guardedly favorable.

September 21, 1923, Dr. Dewey (Pltf.'s Ex. #17): Tuberculosis, chronic, arrested. Able to resume pre-war occupation.

In addition to the above plaintiff's exhibit #7 shows that on January 20, 1921, the gall bladder operation had healed well.

Dr. Bridges examined the plaintiff in the fall of 1923 and again in 1928 and 1932. He testified that he made no record of these examinations and he believed the plaintiff gave him a case history of shortness of breath, night sweats, afternoon temperature, inability to do anything. He then stated that his diagnosis was pulmonary tuberculosis; that he told plaintiff he was suspicious of tuberculosis and advised him to rest. The witness then expressed the opinion that, though plaintiff was able to do light work at times during quiescence, he was nevertheless totally permanently disabled because of tuberculosis, which had existed for several months and which arose some time between 1919 and 1923 (R. 49-50).

During the next five years five doctors examined plaintiff. Their findings are summarized below:

Fall of 1923 (after examination by Dr. Bridges): Plaintiff passed a physical examination for an appointment with the Illinois Central Railroad (R. 45). (Plaintiff's testimony.)

Sometime in 1925: Plaintiff passed physical examination for employment with the United Fruit Company (R. 46). (Plaintiff's testimony.)

Early in 1927: Plaintiff passed physical examination for employment with the K. C. M. & O. Railroad (R. 46). (Plaintiff's testimony.)

July 8, 1927, Dr. DuPree (R. 71-72): Abnormal lung tissue, active tuberculosis not indicated, there could possibly have been some activity but, if so, it could not have been far advanced. (Based upon written report introduced as plaintiff's exhibit #21.)

February 9, 1928, Dr. Beem (R. 52-54): Gall bladder disease, neither the examination nor case history given by the plaintiff indicated tuberculosis. This doctor stated that ordinarily a gall bladder operation did not produce conditions to prevent a man from working though some cases have produced adhesions so severe as to prevent physical work.

In addition to the above plaintiff introduced exhibits numbered 18, 19, 20, which show pulmonary tuberculosis, far advanced in the spring of 1928 and early part of 1929.

In response to a hypothetical question (R. 56) including only part of the evidence (the question made no reference to plaintiff's exhibits 1 to 10; 13 to 18; or 21 and 22), Dr. Cohn expressed an opinion that plaintiff had tuberculosis when he

went into the Navy and became totally permanently disabled therefrom some time after enlistment and prior to discharge (R. 60). Though this witness had personally examined plaintiff (R. 60) apparently his own examination formed no portion of the basis of the above opinion. He explained that he arrived at this conclusion by the process of reasoning that a man at the age of thirty-three does not ordinarily or often develop tuberculosis; that plaintiff was diagnosed as having active tuberculosis in 1921 and according to Dr. Hodges plaintiff was also diagnosed as having active tuberculosis in the summer of 1920; that, therefore, it was obvious that the tuberculosis shown when the first x-ray was made (apparently August 1921) had been in the man's chest for a considerable period of time for which reason it undoubtedly was present and active at the time of plaintiff's discharge from service and consequently he was totally permanently disabled at that time (R. 57).

On cross-examination Dr. Cohn stated that tuberculosis is curable but that he would consider plaintiff's case to have become incurable about six months prior to the time the first doctor had said that he had tuberculosis (R. 58). He then stated that his opinion was as of 1933 and that "he couldn't render an opinion as to curability in 1920"; that plaintiff's tuberculosis was a type of slow progression so that it was impossible for it to have developed in the two year period between the date of discharge and the fall of 1921 (R. 61) and

that though the case had reached the stage of incurability as of the latter date he could not say whether or not it was curable at the time of discharge because he did not know (R. 62). The witness also testified that plaintiff's tuberculosis had not developed more rapidly because of gall-bladder trouble (R. 58).

Prior to 1928 plaintiff received the following treatment: Soon after discharge Dr. Evans treated him for stomach and gall-bladder trouble and cough (R. 43); on June 24, 1920, he had an operation for gall-bladder trouble (R. 38) and was given phosphate of soda and cough medicine (R. 48). In the winter of 1921 and 1922 he spent a short time in a tuberculosis hospital (R. 39) and was operated upon for appendicitis while there (R. 44). A third operation was performed for fistula in 1924 (R. 45-46). Though plaintiff testified (contrary to a statement purported by plaintiff's exhibit # 21 to have been made on July 8, 1927) that he consulted three doctors while in Honduras between 1925 and 1927 (R. 41), the nature of their treatment is not indicated.

Plaintiff testified that he was thirty-three years old when he enlisted (R. 36), that he had a fifth-grade education (R. 39), and that prior to that time he had worked on a farm, in a sawmill, and in the mines; that he worked short periods for different people, frequently going from one job to another. Sometimes he missed a week between jobs and

sometimes he secured a new job the same day he quit a previous one (R. 42-43).

According to plaintiff's own testimony he has been employed since service an aggregate of more than two years as follows:

In the oil fields prior to June 1924. One period of six weeks. One period of two months. (In an application made in August 1920 he stated that he worked from January to May 1920 at \$6.00 per day (R. 43-44)) (Deft's. Ex. A).

For the Southern Railroad. September to December 1920. Plaintiff testified that he worked only about one-half time here (R. 38), but on cross-examination he explained that he was on the extra list subject to call and that he worked whenever called (R. 44).

In an undertaking parlor, winter 1922 and 1923. Six or eight weeks as part of vocational training (R. 31). Missed only a day or two (R. 44).

Railroad work in the summer of 1923. One month on his former job with the Southern Railroad (R. 45). Three or four months with the Illinois Central Railroad. On this job he was on the extra list subject to call. Plaintiff stated that sometimes he was not able to answer the call (R. 45).

Winter 1923 and 1924. Two or three months as a shirt salesman. Plaintiff stated that he earned \$30.00 to \$40.00 per month and worked on an average of five or six hours per day (R. 40).

In Honduras 1925 to 1927. One period of two months. One period of three months. More later. Plaintiff testified that he was able to work only about two days per week (R. 41).

For the K. C. M. & O. Railroad 1927. Six or eight days (R. 46-47).

The testimony of the plaintiff and one of his lay witnesses indicates that while in the service the plaintiff worked part of the time as a coal passer in the fireroom of his ship; that the fireroom was comfortable while in port but very hot and poorly ventilated while at sea; that plaintiff slept on a deck where ventilation was bad when the ship was out at sea. Plaintiff testified that on one occasion he "fell out" from over-heat, after which he was put in charge of the evaporators which was very much lighter work (R. 36-37). The ship was out of port three or four days for each trip and made two trips a month for three consecutive months (R. 34-35). Plaintiff testified that while in the service and at discharge he had a tired feeling, a cough and cold with pains in his chest and abdomen, accompanied by constipation and diarrhoea (R. 37). In substance he repeated this testimony as of the fall of 1920 (R. 39); the spring of 1921 (R. 39); the winter of 1922 and 1923 (R. 32, 44). He testified that in the fall of 1923 he had pains in his abdomen, omitting the pains in his chest, and that he was tired (R. 40) and the same symptoms were reported by him for the time he was in Honduras and as of May,

1928 (R. 41). In 1921 plaintiff was drawing \$80.00 per month compensation (R. 44) which was stopped about the end of 1923. He made no attempt to have his compensation reinstated (R. 46).

POINTS AND AUTHORITIES

There is no substantial evidence that plaintiff was totally permanently disabled from November 1919

Falbo v. United States, 64 F. (2d) 948 (C. C. A. 9th), affirmed, *per curiam*, 291 U. S. 646.

United States v. McShane, 70 F. (2d) 991 (C. C. A. 10th), certiorari denied, 55 S. Ct. 141.

Grate v. United States, 72 F. (2d) 1 (C. C. A. 8th), certiorari applied for.

Puckett v. United States, 70 F. (2d) 895 (C. C. A. 5th), certiorari denied, 55 S. Ct. 99.

United States v. Baker (C. C. A. 4th), 73 F. (2d) 455.

United States v. Hansen, 70 F. (2d) 230 (C. C. A. 9th).

United States v. Hill, 61 F. (2d) 651 (C. C. A. 9th).

United States v. Crume, 54 F. (2d) 556 (C. C. A. 5th).

ARGUMENT

I

There is no substantial evidence that plaintiff was totally permanently disabled from November 1919

Except for a service record of chancroid, a disability both minor and temporary, there is no con-

temporaneous medical testimony of any disability during the entire time, nearly two years, that plaintiff was in the naval service nor within the period of his insurance protection. Though in the summer of 1920 plaintiff had a gall bladder operation from which he made a normal recovery (R. 73, Pltf's. Ex. 5, 6), the first definite diagnosis of active tuberculosis, upon which disability his case rests primarily, was not made until August 2, 1921. The lay evidence of plaintiff's physical condition during the time his policy was in force consists entirely of his own testimony that while still in the service he had a cold and cough, felt tired and had some pains in his chest and abdomen.

Though it cannot be conceded, it might for the moment be speculatively assumed that in November 1919, plaintiff was totally disabled by reason of incipient tuberculosis. But having assumed this there is still a total absence of proof that such disability was then permanent, and the case falls within the ruling of this Court in *Falbo v. United States*, 64 F. (2d) 948 (C. C. A. 9th), affirmed *per curiam*, 291 U. S. 646 and the rulings of numerous other decisions of which the following are illustrative:

United States v. McShane, 70 F. (2d) 991 (C. C. A. 10th) certiorari denied 55 S. Ct. 141.

Grate v. United States, 72 F. (2d) 1 (C. C. A. 8th) (certiorari applied for).

Puckett v. United States, 70 F. (2d) 991 (C. C. A. 5th) certiorari denied 55 S. Ct. 99.

United States v. Baker (C. C. A. 4th),
73 F. (2d) 455.

The principal of these decisions has been effectively stated by Judge Parker speaking for the Fourth Circuit in *United States v. Messinger*, 68 F. (2d) 234, 237:

To say that a man who has an arrested case of tuberculosis, or a case which can be arrested with proper treatment, is totally and permanently disabled, because he cannot do heavy labor or work amid all conditions, is to adopt a theory contrary to human experience and one which has been repudiated by the courts in a practically unbroken line of decisions.

Each of three doctors for plaintiff testified to an opinion of total permanent disability. Such opinions, clearly inadmissible upon objection (*United States v. Stephens* (C. C. A. 9th), decided November 13, 1934) and presumably not considered in a nonjury case (*United States v. National Bank of Commerce of Seattle* (C. C. A. 9th), decided November 19, 1934), would not, in any event, constitute substantial evidence. *United States v. Baker* (C. C. A. 9th), decided November 13, 1934; *Hamilton v. United States* (C. C. A. 5th), 73 F. (2d) 357; *United States v. Howard*, 64 F. (2d) 533 (C. C. A. 5th); *United States v. Doublehead*, 70 F. (2d) 91 (C. C. A. 10th).

Whatever significance may be given to the testimony of Dr. Bridges has a tendency to refute rather than to support plaintiff's contention. He

thought plaintiff's tuberculosis "arose some time between 1919 and 1923" (R. 50). Dr. Hodges, plaintiff's witness, testified that there "were occupations Woodall could have held down fairly well where not much physical exertion or exposure was required" (R. 49). The insurance matures only in the event of disability precluding pursuit of *any* substantially gainful occupation (*United States v. Thomas*, 53 F. (2d) 192 (C. C. A. 4th); *Proechel v. United States*, 59 F. (2d) 648 (C. C. A. 8th) and the fact that little exertion is required does not alter the legal effect upon a claim of earlier total permanent disability of a recognized ability to work. *United States v. Hansen*, 70 F. (2d) 230 (C. C. A. 9th); *United States v. Green*, 69 F. (2d) 921 (C. C. A. 8th); *United States v. Timmons*, 68 F. (2d) 654 (C. C. A. 5th). Dr. Cohn did not profess to have any opinion concerning the curability of plaintiff's disability during the time the insurance was in force (R. 58, 62).

Though in June 1920 Dr. Hodges, whose diagnosis of plaintiff's case is the earliest appearing in evidence, suggested to plaintiff that he might have tuberculosis, the records show no treatment for tuberculosis until the latter part of 1921, when plaintiff spent a short time in a tuberculosis hospital in Los Angeles. In 1923 he was again advised by a doctor that he probably had tuberculosis, yet the record does not show that between 1923 and 1928 he received any treatment for this condition. On the other hand, there is the positive evidence,

based upon reports of physical examinations, that plaintiff's tuberculosis was curable on July 7, 1922 (R. 65, Pltf.'s Ex. #22) and that it was arrested and that he was able to work on October 13, 1922 (R. 68-69, Pltf.'s Ex. #13); April 10, 1923 (R. 76-77). It is well established that an insured cannot recover on a War Risk Insurance policy for a total disability existing before lapse which became permanent after lapse because of failure to take treatment.

Falbo v. United States, supra.

United States v. McShane, supra.

Eggen v. United States, 58 F. (2d) 616 (C. C. A. 8th).

United States v. Rentfrow, 60 F. (2d) 488 (C. C. A. 10th).

Though abstractly the work record, consisting of an aggregate of short periods, is not impressive, it compares favorably with plaintiff's piecemeal work record prior to service, and the three temporary disabilities which arose subsequent to service and for each of which a successful operation was performed, have no tendency to establish total permanent disability during the life of the insurance policy. On the other hand, they tend more to explain why plaintiff, otherwise not totally disabled, did not work more regularly.

United States v. Linkhart, 64 F. (2d) 747 (C. C. A. 7th).

United States v. Ennis, 73 F. (2d) 310 (C. C. A. 4th).

Considering plaintiff's long delay in bringing suit, his case is left entirely in the realm of speculation, surmise and conjecture,

Lumbra v. United States, 290 U. S. 551.

United States v. McShane, *supra*.

Eggen v. United States, *supra*.

and viewing the evidence in the light most favorable to him, it is apparent that his case falls within the rule where if either of two inconsistent inferences may be drawn, one that he was totally disabled and the other that he was not, he has established neither and is not entitled to recover. *Eggen v. United States*, 58 F. (2d) 616 (C. C. A. 8th); *Penna. R. Co. v. Chamberlain*, 288 U. S. 333; *Stevens v. The White City*, 285 U. S. 195.

CONCLUSION

Defendant respectfully submits that there was no substantial evidence that plaintiff was totally permanently disabled from November 1919, that the trial court erred as heretofore assigned, and that, therefore, the judgment of said trial court should be reversed.

PEIRSON M. HALL,

United States Attorney.

HUGH L. DICKSON,

Asst. United States Attorney.

WILL G. BEARDSLEE,

Director, Bureau of War Risk Litigation.

KEITH L. SEEGMILLER,

Attorney, Department of Justice.

